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In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, et al., (Seattle Intervenor Plaintiffs/Appellees)

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QUESTIONS PRESENTED

1. Does a statute that does not specifically use the words "race" or "racial", but which has a concededly racial nexus, having been conceived, drafted, advocated, and adopted for the specific purpose of terminating an ongoing program to eliminate racial imbalance in a previously segregated school district, constitute a suspect racial classification?

2. Does a statute which inhibits local school officials from using a method necessary for the effective elimination of racial segregation from the public schools impermissibly interfere with the constitutional duties of such school officials?

3. Does a statute granting a private right to attend the public school nearest or next nearest a student's residence impermissibly involve the state in the encouragement and promotion of private discrimination where the conceded effect of

the decisions of private individuals sanctioned by the statute is a resegregation of previously desegregated public schools and increased residential segregation by race?

4. Did the district court correctly analyze the relevant facts in reaching its conclusion that a racially discriminatory intent or purpose was one of the factors which motivated the adoption of Initiative 350?

5. Did the court of appeals correctly apply the usual rule that successful plaintiffs should be awarded their reasonable attorney's fees and costs in actions to vindicate constitutional rights, absent a special circumstance rendering such an award unjust, where the denial of constitutional rights was by the state, and the litigation costs would otherwise be paid from funds allocated for the education of the children whose rights were vindicated?

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BRIEF OF SEATTLE INTERVENOR PLAINTIFFS/APPELLEES

STATEMENT OF THE CASE

A. Adoption of School District Appellees' Statement of the Case

The brief filed by the School District Appellees accurately summarizes the historical background and the record, and is adopted by these appellees. In this respect, and in the argument herein, these appellees wish to avoid duplication of that which is well presented elsewhere.

B. Comments on Appellants' Statement

The Statement of the Case, set out in the Brief of Appellants at 3, requires comment. The section entitled "The Historical Legal Background" goes outside of the record to claim a state history of non-discrimination that does not comport with reality and was not at issue in the courts below. These appellees will address this error in their argument.

The Brief of Appellants also erroneously describes Tacoma as a desegregated district with "no mandatory bussing program" which "adheres to an 'open enrollment' policy which allows any student within the District to attend the school of his or her choice, subject to practical limitations, using the Tacoma Transit System." Appellants' Brief at 6.

In fact, the Tacoma desegregation program operates by denying minority

students admittance to their neighborhood schools in order to create capacity for white students to transfer into those schools. While these minority students may still be free to choose which alternate school to take a bus to, it is misleading to say that there is no "mandatory bussing program." (J.S. A-24-25). While this distinction may appear slight, it is significant. If the State were correct in asserting that Tacoma is able to maintain a desegregated system through a truly "open enrollment" policy, Initiative 350 would have no impact on racial imbalance in that system. However, as the district court specifically found, "[i]f implemented, Initiative 350 will make it impossible for Tacoma schools to maintain their present racial balance." (J.S. A-25, ¶ 10.1).

SUMMARY OF ARGUMENT

After years of increasing racial segregation in Seattle's schools, the Seattle School Board, threatened with imminent litigation, adopted the Seattle Plan for the Elimination of Racial Imbalance. Implementation of the Seattle Plan in the school year beginning September 29, 1978, was well underway when Initiative 350 was adopted with an effective date of December 7, 1978.

The district court found that Initiative 350 "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." (J.S. A-34). That conclusion is not questioned by the appellants. Nor do they seriously question the district court's conclusion that Initiative 350 would accomplish its purpose if it were adhered

to by school officials (in the absence of an overriding court order).

1. In concluding that a racially discriminatory purpose was one of the factors that motivated the conception and adoption of Initiative 350, the district court correctly considered the factors outlined by this Court in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Factors considered by the district court included the historical background of Initiative 350, the specific sequence of events leading to it, the procedural and substantive departures from the norm in connection with its adoption, and what the State admits to have been the "virtually uncontroverted evidence that most of the state's voters were aware that Initiative 350 was drafted in response to the Seattle Plan and

that, if adopted, it would have the effect of curtailing its implementation." (Appellants' Brief at 29).

2. The district court also correctly concluded that Initiative 350 is a racial classification unsupported by any compelling state interest. The rationale articulated by the Court in Hunter v. Erickson, 393 U.S. 385 (1969), applies with even greater force to this case, since Initiative 350 seeks to undo benefits already gained and creates a greater political barrier to the achievement of important goals by racial minorities than that created by the amendment of the Akron City Charter in Hunter.

3. The district court was also correct in concluding that Initiative 350 is overly inclusive because it prohibits local school officials from taking actions pursuant to the Court's often

repeated command that local school officials have the first and primary responsibility for eliminating racial discrimination in the public schools. Even if the State Attorney General were to render an authoritative opinion stating that Initiative 350 has no effect on the power of local school officials who believe themselves to be under a constitutional obligation, the defect would not be cured. Such an opinion would, at most, prevent enforcement action by state officials but could not prevent any interested person from enforcing the statute, since state courts are not bound by opinions of the Attorney General.

4. Initiative 350 is also invalid under the principle announced in Reitman v. Mulkey, 387 U.S. 369 (1967), that a state may not significantly encourage private discrimination. Although not relied upon by the lower courts, this principle provides an additional basis for affirmance.

5. The claim by the State that Initiative 350 merely restores a "state-wide neighborhood policy" is totally without merit. No such policy exists, and the state-wide policy to eliminate racial isolation that predated Initiative 350 would be destroyed by it.

6. These appellees ask that the Court disregard the position now taken by the United States and disallow further participation by the United States as a party. The brief on behalf of the United States was filed after these appellees objected to the ethical propriety of continued participation in the case by attorneys who previously participated on the opposite side. The original permission to intervene granted to the United States was based upon a statute permitting such participation only in support of civil rights plaintiffs. The United States' unprecedented repudiation in this Court of

the position it urged in the lower courts should not be condoned.

7. These appellees fully support the School District Appellees with respect to the issue of attorneys' fees. The award of attorneys' fees to the School District Appellees directed by the court of appeals is consistent with the purpose of the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. Failure to allow attorneys' fees would directly penalize the children who attend the Seattle public schools since the cost of this litigation would be paid out of money intended and otherwise available for direct educational expenditures. The State's claim that an award of attorneys' fees would represent a "double-dipping" by the Seattle School District is factually incorrect.

The courageous action of the Seattle School Board is precisely what the Court has demanded of school officials in the

past. Now the Court should lend the full weight of its legal and moral authority to the support of that school board. The Seattle Plan is a dramatic step toward the fulfillment of the national dream of equality of opportunity. It is unthinkable that this Court would require the Seattle School District to turn back now toward a resegregation of its public schools and the entrenchment of segregated housing that the district court found would follow.

ARGUMENT

The State Attorney General's Account of State History On Racial Matters Is Misleading

In its statement of the case under a section entitled "The Historical Legal Background," the Attorney General makes an assertion of fact which, even if technically correct, is highly disingenuous:

> To date, no Washington school district has ever been judicially declared to have engaged in racial segregation in violation of the Fourteenth Amendment in the assignment of students in Washington's

> public schools. [State's Brief at 3.]

In going outside of the record to allege the non-existence of prior judicial determinations of purposeful segregation in Washington State, the Attorney General would apparently have the Court draw the inference that purposeful segregation has never occurred in Washington. The absence of such a judicial declaration is hardly surprising in view of the fact that the only three school districts with sufficient minority populations to be impacted by Initiative 350 were desegregated by their own school boards after the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954).[1] Rather than drawing the inference of non-discrimination sought by the Attorney General, the

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[1] Pasco and Tacoma accomplished the desegregation of their schools before the Court's decision in Keyes v. School Distr. No. 1,

facts compel the opposite inference. First, the inference sought by the Attorney General is destroyed by the State's own admissions. As the State informed the district court in the Post Trial Brief of State Defendants (CR 387 at 23):[2]

> [T]he state defendants believe that the Pasco School District is presently under an obligation to cure both the original (but still partially unproven on this record) and the ongoing invidious and intentional racial discrimination (which has already been described above and which is established on this record.) [State's emphasis].

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413 U.S. 189 (1973). (J.S. App. A-9 to A-12). Seattle's desegregation of its middle schools and later adoption of the Seattle Plan both followed and responded to litigation or threats of litigation. (J.S. App. A-14 to A-18). See also pp. 72-79, infra, discussing the Seattle School District's allegations of purposeful discrimination by other governmental entities and its admissions of the probability that a court would find unlawful segregation in Seattle if the facts were examined in litigation.

[2]In its brief to this Court, the State also asserts that the Pasco School District is

In its review of "The Historical Legal Background," the Attorney General also makes reference to "a comprehensive scheme of civil rights law," with citations to 14 state statutes relating to discrimination. (State's Brief at 3-4 n.2). The only possible relevance of these statutes to the matter before the Court would be if the Attorney General were asking the Court to infer from these statutes that racial fear and prejudice has never existed in Washington and that, therefore, it is unlikely that racial fear and prejudice could have motivated any of those who proposed or supported Initiative 350. Again, the opposite inference is compelled. If Washington State were free from this pernicious national affliction, there

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Footnote 2 (cont.)

guilty of "invidious racial discrimination" in a situation "worse than that which the Sixth Circuit found deplorable in Lansing." (State's Brief at 15-16).

would have been no need for such legislation. In fact, the continuing existence of racial prejudice and intolerance is evidenced by the most recent anti-discrimination statute, passed in 1981 by the Washington State Legislature in response to cross burnings at the homes of blacks in Seattle, Kent and Woodinville, the painting of swastikas on Jewish-owned businesses in Olympia, and harassment of Hispanics in Yakima.[3] The State fails to mention

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[3]Senate Bill No. 3342, Chapter 267, Laws of 1981, a criminal statute relating to malicious harassment, effective July 26, 1981. The cross burnings and other racial incidents were widely reported. See Seattle Times, Nov. 4, 1980, § C at 2; Seattle Post-Intelligencer, Nov. 4, 1980, § A at 7; Seattle Times, Nov. 26, 1980, § D at 18; Seattle Times, Jan. 18, 1981, § E at 21, Seattle Times, Apr. 2, 1981, § A at 16; Seattle Times, Aug. 17, 1981, § C at 2; Seattle Post-Intelligencer, Oct. 31, 1981, § C at 1; and Seattle Times, Oct. 31, 1981, § B at 10.

this statute and this history in its brief.[4]

In sum, Washington, as elsewhere in the nation has a record of discrimination against racial minorities that includes both progressive efforts to cure the scourge and continuing reminders of the extent to which human action is influenced by subconscious fears and prejudices.

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[4]Prejudice and Discrimination in Washington has not been limited individual action. Some examples of proven discrimination by governmental entities: Lindsay v. City of Seattle, 86 Wash. 2d 698, 704, 548 P.2d 320, 325, cert. denied, 429 U.S. 886 (1976), (evidence established prima facie case of discrimination against minorities in city employment practices); Hsieh v. Civil Serv. Comm'n of Seattle, 79 Wash. 2d 529, 488 P.2d 515 (1971) (public employment discrimination against aliens); Washington Bd. Against Discrimination v. Board of Directors, 68 Wash. 2d 262, 412 P.2d 769 (1966) (school district discriminated on basis of race in employment); Castaneda v. Granger Pub. Schools, Washington Human Rights Reporter PWD-122, (Washington State Human Rights Commission, March 15, 1973) (district held to have discriminated in employment on the basis of race).

Providing Truly Equal Opportunity In Public Education Requires Steadfast Adherence to the Principles Announced In Brown I and II and Their Progeny

By comparison with the 204 years which transpired from Virginia's legislative recognition of slavery as an institution in 1661 to 1865 when the Thirteenth Amendment officially terminated slavery in the United States, the 28 years since this Court's decision in Brown I[5] is a mere historical moment.

The Court is well aware of the resistance that has frequently accompanied the implementation of the Court's mandate in Brown I. In light of that resistance, it is remarkable that the basic teaching of Brown I has never seriously been questioned:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both

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[5] Brown v. Board of Education, 347 U.S. 483 (1954).

> demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

347 U.S. at 493, 495.

Brown II[6] considered "the complexities arising from the transition to a system of public education freed of racial discrimination." 349 U.S. at 299. The Court went on to declare that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." Id.

The affirmative duty of school boards to eliminate racial discrimination was again emphasized in Green v. County School

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[6] Brown v. Board of Education, 349 U.S. 294 (1955).

Board of New Kent, 391 U.S. 430 (1968), and its companion cases.[7]

The primary, affirmative obligation of local school officials was reiterated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in a unanimous opinion by the Chief Justice: "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked." Id. 15.

In considering when and under what circumstances the courts should interfere with the administration of the public schools, the Court has noted:

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[7] Raney v. Board of Ed., 391 U.S. 443 (1968); Monroe v. Board of Comm'rs., 391 U.S. 450 (1968). In Green, the Court also held that local school authorities do not meet their "continuing duty" to eliminate racial discrimination by the adoption of a "freedom of choice" plan where experience has shown such a plan to be ineffective. 391 U.S. at 440.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. at 469. Thus, in San Antonio School District v. Rodriguez, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

Milliken v. Bradley, 418 U.S. 717, 741-742 (1974).

Of all of the constitutional doctrines relating to race and schools that this Court has articulated, none has been more often repeated and more steadfastly adhered to than the principle that local school officials have a primary constitutional duty to take such actions as may be required to assure the vindication of the

constitutional rights of the children whose school attendance is compelled by the State.[8]

Initiative 350 seeks to deny from Washington's local school officials the very responsibility this Court has repeatedly held to be imposed upon them by the Constitution. It is difficult to conceive of a statute which more directly and flagrantly confronts the principles enunciated by this Court. As noted earlier, both the statute struck down in Lee v. Nyquist, 318 F. Supp. 710, and the Equal Education Opportunities Act of 1974, upon which the State mistakenly relies, specifically granted local school officials the power

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[8] In addition to the cases cited above, other cases recognizing this affirmative duty include Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 460 (1979); Dayton Bd. of Ed. v. Brinkman (II), 443 U.S. 526, 537 (1979); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); United States v. Scotland Neck Bd. of Ed., 407 U.S. 484 (1972); Davis v. School Comm'rs of Mobile County, 402 U.S. 33 (1971).

Initiative 350 seeks to deny them. Even California's Proposition 1, under review with this case in No. 81-38, Crawford v. Board of Education, specifically provides that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended." (Petitioners' Brief in No. 81-38 at 6).

Seattle was the first major city in the United States to implement an extensive desegregation plan without court order.[9] The Seattle Plan works. On October 16, 1981, the President of the Seattle School Board testified before the Subcommittee on Separation of Powers of the Committee on

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[9] U.S. Comm'n on Civ. Rts., Desegregation of the Nation's Public Schools, A Status Report 67 (1979).

the Judiciary of the United States Senate:[10]

> The Seattle Plan has successfully desegregated Seattle's schools, and educational quality has been enhanced. All students now have the opportunity for a multi-ethnic education, which Seattle citizens believe is essential to preparation for life in this pluralistic society. There have been no adverse educational effects. Achievement scores have risen slightly district-wide, and in fact, achievement gains in the pairs and triads appear greater than in other District schools.
>
> The Seattle Plan has not had a harmful effect on white enrollment. Before the Plan, enrollment had fallen steadily from nearly 100,000 (over 85% white) in 1963 to under 60,000 (65% white) in 1977. In the first three years of the Seattle Plan, the proportion of white students in the District declined roughly 3% per year, the same rate as in the three years before the Plan. Had it not been for the influx of thousands of Asian immigrant students, the drop in the

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[10] See Oct. 16, 1981 Statement of Suzanne Hittman, Proposed Bills on Court Ordered School Busing - Hearings on S.528, S.1147, S.1647, & S.1743 before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. (1981).

proportion of white students this year and last would have been closer to 1%. And it appears that school desegregation has played a part in slowing, and even reversing, the trend toward greater residential segregation in some portions of the city.

Seattle has adjusted peacefully to desegregated schools. At the last local property tax levy election, a near record rate of voter approval -- roughly 80% -- was achieved. And in the most recent School Board elections, pro-Seattle Plan candidates defeated anti-Seattle Plan candidates. Several efforts to stop the Plan, including a statewide initiative and recent legislative action, have been resisted successfully by the School Board in the courts.

Last spring, after a lengthy process of citizen involvement, the Seattle School Board adopted a three-year plan of school closures and complementary changes in the desegregation plan. Continued local control of desegregation has permitted modifications in the Plan to be made on an educationally sound basis, and with minimum disruption.

Seattle is now prepared to make further progress. The City Council and School Board have jointly adopted goals calling for coordinated action to encourage residential integration. With cooperation of City, School District and housing officials, Seattle should be able to reduce the need for mandatory assignments over the long term.

> We believe the Seattle experience demonstrates how proper planning and responsible leadership can produce school desegregation that is successful educationally and successful in stabilizing a city school system. Where elected officials do not ignore their oaths of office, but instead discharge their constitutional obligations, the courts and the federal government need not intrude in local school governance. Again, we urge the Committee to refrain from any action which would impair the ability of local school districts to desegregate with local control, or which would impair their incentive to do so.

Appellants' Arguments Disregard the Central, Unique, Critical, and Controlling Fact of This Case: The Initiative Was Designed to, and if Enforced Would Resegregate Previously Desegregated Public Schools

A. The factual context

Appellants' brief avoids any mention of the undisputed fact that enforcement of Initiative 350 would actually cause the resegregation of thousands of school children in the only three school districts that the initiative substantially affects. This is the unique and controlling fact of this case. This ultimate fact should be

considered together with six other basic facts, none of which are in substantial dispute:

1. If the Seattle School Board had not adopted the Seattle Plan, the Board would have become a defendant in an action alleging past purposeful segregation of the district. (J.S. A-18, ¶ 6.12; Complaint in Intervention of Seattle Intervenor Plaintiffs at 5-7).

2. The Seattle School Board had full legal authority to adopt and implement the Seattle Plan under Washington law prior to Initiative 350. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

3. The action of the Seattle School Board in adopting the Seattle Plan was mandated by and consistent with existing state policy requiring the elimination of segregation in the public schools, whether de jure or de facto. See argument infra at pp. 44-51.

4. The Seattle Plan was already in its first year of implementation (a school year beginning on September 29, 1978) and had sharply reduced the degree of racial imbalance in the Seattle School District when Initiative 350 was passed. Affidavit of David L. Moberly [supporting Plaintiffs' Motion for Preliminary Injunction at 13 and Ex. D thereto]; (J.S. A-18, ¶ 6.13 and A-22, ¶ 7.24).

5. Initiative 350 was "conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." (J.S. A-34.)

6. The district court's finding that implementation of Initiative 350 would result in increased racial imbalance in the plaintiff school districts is undisputed. (J.S. A-23, ¶ 8.1.)

B. The rationales of Hunter v. Erickson and Lee v. Nyquist apply with even greater force to the facts of this case

The State's efforts to distinguish Hunter v. Erickson, 393 U.S. 385 (1969), and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), only reinforce the conclusion that the rationale of those decisions applies with even greater force to the facts of this case than to the facts upon which those cases were decided.

The amendment to the Akron City Charter struck down in Hunter, and the statute struck down in Lee, both applied only to future efforts by racial minorities to achieve equality of opportunity in housing and education. In marked contrast, Initiative 350 was intended to, and would, if enforced, not only limit the authority of local school districts to accomplish

desegregation in the future, but would actually reverse progress made in the past.

In Hunter, a fair housing ordinance enacted by the Akron City Council was invalidated by a referendum amending the City Charter. The City Council had been under no affirmative constitutional obligation to enact such an ordinance. Indeed, the Akron Ordinance had provided "an enforcement mechanism unmatched by either state or federal legislation." 393 U.S. at 389. In striking down the charter amendment, the Court said in Hunter:

> Even though Akron might have proceeded by majority vote at town meeting[s] on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

Id. at 392-393.

According to the State, "[t]he true basis for Hunter, it is also important to note, was emphasized in James v. Valtierra, 402 U.S. 137 (1971)... ." Appellants' Brief at 12. The State then quotes the very language from James v. Valtierra that distinguishes it from this case as effectively as it distinguished it from Hunter:

> The Article [amending the California Constitution] requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority

Appellants' Brief at 12-13, quoting from 402 U.S. 140-141 (emphasis added).

James v. Valtierra, like San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), involved non race-related legislation. Although Initiative 350 did not employ the word "race" or

"racial", just as in Hunter, the legislation was uncontestably race-related.[11] The portion of James v. Valtierra quoted by the State makes it clear that the touchstone of Hunter is not the mere use of the word "race" or "racial" in a statute, but whether "in fact" the legislation was intended to deal with a racial matter.

The New York statute struck down in Lee v. Nyquist, 318 F. Supp. 710, was far less comprehensive in its prohibitions of actions designed to improve racial balance. That legislation sought to prohibit state education officials and appointed school boards from action to alleviate racial imbalance, "[e]xcept with the express approval of a board of education having jurisdiction, a majority of the members of

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[11] The second question presented by the State even acknowledges Initiative 350's "racial nexus." Appellants' Brief 1.

such board having been elected. . . ." Id. at 712. The statutory obstacles to effective desegregation created by Initiative 350 deny the very exception allowed by the statute in Lee.

In Lee, as in the present case, the state defendants argued that the legislation did not constitute impermissible state involvement in racial discrimination in the absence of a finding of de jure segregation. The three-judge panel in Lee replied:

> But the argument that the state has not discriminated because it has no constitutional obligation to end de facto racial imbalance fails to meet the issue under Hunter v. Erickson. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. Indeed it completely prohibits the implementation of such policies where the local board is not elected. The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification.

Id. at 719 (court's emphasis).

Initiative 350 not only places a greater burden on those seeking to implement educational policies designed to deal with race on the local level than the statute struck down in Lee, but it operates retroactively to deprive minorities of benefits already gained. The court in Lee, quoting interrogatory answers by the defendant Commissioner of Education, noted that "[the New York statute] will not itself tend to reduce benefits already gained... ." Id. at 717.

Straining to find a meaningful distinction between the two statutes, the State points out that Initiative 350 allows elected school boards to assign students to the "next or next nearest" school while the statute in Lee forbade non-elected school boards from compelling assignments "even to the next nearest school." Appellants' Brief at 14. This comparison is specious. Although Initiative 350 prohibits locally

elected school boards from assigning students to any but the "nearest or next nearest" school, the statute in Lee permits locally elected school boards to assign students to any school for any reason, including achieving racial balance. The tortured effort to distinguish Lee continues when the State asserts:

> And observe further, in this regard, that the ban [in Lee] applied only in districts where the majority of the school board was not elected, i.e., in those districts in which the "local racial hostility" to increased racial balance could not exercise control on the local level.

Appellants' Brief at 14 (Appellants' emphasis). Although the meaning of the quoted statement is somewhat obscure, the State apparently suggests that the statute in Lee somehow would have been less offensive if the ban had also applied to those districts in which "local racial hostility" to increased racial balance

could exercise control on the local level, i.e., those districts where the majority of the school board was elected.

C. Initiative 350 significantly involves the State in the encouragement of private discrimination

Although the lower courts did not reach or rely upon the separate constitutional doctrine that a state may not significantly involve itself in the facilitation or encouragement of private discrimination, that doctrine provides a separate and independent ground for affirmance. For much the same reasons outlined above with respect to Hunter v. Erickson, and Lee v. Nyquist, the rationale of Reitman v. Mulkey, 387 U.S. 369 (1967), applies with even greater force to the facts of the present case than to the amendment to California's state constitution invalidated in that case. That amendment, like the legislation in Hunter and Lee, had only

prospective application. That amendment invalidated existing state fair housing legislation, but did not seek to strip any person of benefits already obtained under that legislation. Initiative 350, by contrast, is a statute designed to restore the status quo ante.

Further, unlike private housing transactions, assignment of students to public schools has always been exclusively a public function. Initiative 350 turns that function over to private persons, who are then authorized to exercise racial prejudice in their choice of public schools by choosing to reside in racially segregated neighborhoods with assurance that the racial segregation will extend as well to the schools. Even some of the sponsors of Initiative 350 candidly admitted in their testimony in the district court that some parents, given the choice, would act on racial fear and prejudice to utilize

Initiative 350 to assure that their child would be isolated from children of other races. (See, e.g., J.A. 102-104).

These private decisions, whether or not racially-motivated, affect both the child for whom the decision is made and the entire school system. If local school boards are prohibited from assigning students to any school except that nearest or next nearest their home, even, an "open enrollment" policy is doomed to failure as history in Seattle and elsewhere has amply shown. The district court's finding that racial imbalance in the plaintiff's school districts would increase under Initiative 350 was not in dispute in the trial court and is not disputed on appeal. (J.S. A-23, ¶ 8.1). There is also no dispute over the finding that under Initiative 350 "there is certain to be movement of white parents away from those residential areas where there is a preponderance of minority

families." (J.S. A-25). Through permitting and encouraging such private decisions Initiative 350 would cause the resegregation of the public schools, and greater residential segregation, thereby achieving indirectly what the State cannot do directly. San Francisco Unified School District v. Johnson, 92 Cal. Rptr. 309, 479 P.2d 669, 678-79, cert. denied, 401 U.S. 1012 (1971); see Anderson v. Martin, 375 U.S. 399, 404 (1964); See Evans v. Newton, 382 U.S. 296, 306 (1966) (separate opinion of White, J.). As this Court noted in Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961), "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."

The analysis urged upon this Court by the United States in its amicus curiae brief, at 12-15 in Green v. County School

Board, 391 U.S. 430 (1968), is particularly apt in considering this matter:

> [E]ven if accidental segregation in public education is permissible, the Constitution does not tolerate schemes which invite that result to be accomplished by indirect means through a delegation of State responsibility. [citations omitted.]
>
> In sum, where freedom-of-choice plans leave the schools essentially segregated, while a more traditional assignment policy would not, that segregation may fairly be attributed to the State. That conclusion alone covers the present cases. But the fact that the State is knowingly contributing to the result has another dimension also.
>
> . . . .
>
> The principle is not limited to situations in which the State teaches a philosophy of racial inferiority by expressly compelling segregation. The same message can be conveyed by lesser measures and they are equally forbidden. E.g., Lombard v. Louisiana, 373 U.S. 267; Robinson v. Florida, 378 U.S. 153. Indeed, in some contexts, the Equal Protection Clause prohibits official action which merely facilitates, or gives effect to, private discrimination on the ground of race. E.g., Anderson v. Martin, 375 U.S. 399; McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151; Shelley v. Kraemer, 334 U.S. 1. And see Reitman v. Mulkey, 387 U.S. 369. The State cannot gratuitously take

> steps to make discrimination easy; the Fourteenth Amendment bars State action which unnecessarily creates opportunities for the play of private prejudice. So, here, we submit, the State authorities overstepped the constitutional line by adopting student assignment plans which predictably, if not designedly, cater to the preference of white students to avoid desegregated schools.

As the Massachusetts Supreme Judicial Court noted in Opinion of the Justices, 298 N.E.2d 840, 846 (Mass. 1973), a law like Initiative 350 promotes and preserves segregated schools, thus significantly involving the state in encouraging the private racial discrimination reflected in segregated housing patterns.[12]

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[12]The "historical context" of that case parallels the one here:

> [I]t is quite apparent from the bill's historical context that it was designed to prevent the use of bussing as a means of achieving racial balance. Opinion of the Justices, 298 N.E. 2d at 844 (footnote omitted). Nor did the "immediate objective" and "ultimate effect" of the Massachusetts law differ from Initiative 350. By

This Court has applied an identical analysis: "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967)." Norwood v. Harrison, 413 U.S. 455, 465 (1973).

The Court has also declared that it is not relevant that the State's action was "motivated by other than a sincere interest in the educational welfare of all Mississippi children," so long as the action has

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Footnote 12 (cont.)

giving children and their parents an absolute right to attend the nearest or next-nearest school, Initiative 350 uses "state power to promote and entrench racial separation in all those schools whose communities have segregated residential patterns." Id. at 845.

"a significant tendency to facilitate, reinforce, and support private discrimination," Id. at 466. Thus, the State may not take unusual steps merely to "permit a child ... to choose segregation." Goss v. Board of Education, 373 U.S. 683, 687 (1963).

Because Initiative 350 removes traditional governmental control and creates an effective private right to cause and attend segregated schools, it must not be allowed to stand.

D. Initiative 350 is over-inclusive

These appellees join the School District Appellees in their argument supporting the district court's conclusion that Initiative 350 is impermissibly overbroad. Brief of Appellees at 14. Additionally, we note in a separate section of this brief the incorrect factual premise of the State's claim that this defect is cured by the interpretation purportedly

given to it by the State Attorney General. See pp. 51-58, infra.

E. Initiative 350 - was the product of a forbidden purpose

The district court's analysis of the issue of discriminatory purpose correctly applied the Court's teachings in Washington v. Davis, 426 U.S. 229 (1976), Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, and Personnel Administrator of Massachusetts v. Feeney, supra. The district court's findings in support of its conclusion that discriminatory purpose or intent was one of the factors which motivated the adoption of Initiative 350 are amply supported in the record. This issue is thoroughly discussed in the brief of the School District Appellees and needs no further discussion here.

The Claim That Initiative 350 Merely Restored Washington's "Neighborhood School Policy" Is Based Upon a False Factual Premise

The State claims that Initiative 350 is simply a statement to local school districts that the people want the districts to "retain a neighborhood school policy." Appellants' Brief at 8 (footnote omitted). The brief of the United States also refers to Washington's "state-wide neighborhood school policy." United States' Brief at 26-27 n.28. Neither brief cites any authority for claiming the existence of a statewide "policy."[13] None exists.

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[13] Prior to adoption of the Seattle Plan, the Seattle School District generally assigned students to "neighborhood schools" (see J.S. A-22-23, ¶ 7.28), but that practice was not pursuant to a formal policy or part of any state policy. Students were always bussed in large numbers for a variety of reasons to non-neighborhood schools, including for the purpose of desegregating the middle schools under a mandatory program adopted in 1971. The only member of the Seattle School Board

Prior to Initiative 350, rather than a "state-wide neighborhood school policy," Washington had a state-wide policy to eliminate racial segregation from Washington's schools, regardless of the cause of that segregation--a policy incompatible with the claimed "neighborhood school policy." That policy was clearly articulated in the amicus curiae brief filed in the district court by the Washington State Human Rights Commission.[14]

Footnote 13 (cont.)

who opposed the Seattle Plan and supported Initiative 350 testified that she doesn't even know how to define what a neighborhood school is. (Tr. at 1027).

[14]The office of the Washington State Attorney General is well aware of the conflict between Initiative 350 and Washington's policy requiring effective action to eliminate racial segregation and imbalance, having represented the Washington State Human Rights Commission in filing an amicus curiae brief urging the district court to declare Initiative 350 unconstitutional. The present Washington State Attorney General has refused the Commission's formal request for authorization to

The Washington State Human Rights Commission is required by statute to "formulate policies to effectuate the purposes of [the Washington State Law

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Footnote 14 (cont.)

file in this Court a brief by the Commission or any of its members or officers in their official capacities. This refusal, by letter to the Executive Secretary of the Washington State Human Rights Commission from the Washington Attorney General, dated December 9, 1981, was in response to the passage of the following motion, reflected in the Minutes of the Regular Commission Meeting of November 19, 1981:

> [Moved] To request permission from the State Attorney General to allow the agency's Senior Assistant Attorney General to submit an amicus curiae brief supporting the Seattle School District's position related to Initiative 350, And further, if such permission is not granted by the State Attorney General, the Commission will submit a letter, containing the signatures of all five commissioners, to the U. S. Supreme Court requesting the Brief of Amicus Curiae filed on behalf of the Commission with the U.S. District Court, Western District of Washington, in April 1979 be made a part of the Court's deliberation since this continues to be the Commissioners' position on the issue.

Against Discrimination]." Wash. Rev. Code Ann. § 49.60.100.

In passing Wash. Rev. Code Ann. § 18A. 58.245 in 1969, the legislature directed the State Superintendent of Public Instruction to develop rules and regulations for the implementation of inter-district, voluntary programs deemed necessary by the Superintendent to improve racial balance within and amongst school districts. Enacted in 1974, Wash. Rev. Code Ann. § 28A.41.250, further directed the State Superintendent to devise a state-wide plan to assist school districts in developing programs for the relief of children suffering from racial isolation. Pursuant to Wash. Admin. Code § 162-28-030, the public accommodations section of the law against discrimination is made applicable to schools in their relationship with students, including the rights under Wash. Rev. Code Ann. § 49.60.030 to be free from

discrimination because of race. The State Superintendent was further authorized to withhold approval of construction grants to school districts unless such construction would not create or aggravate racial imbalance. Wash. Admin. Code § 180-30-040.

In the Joint Policy Statement of the Washington State Board of Education and the Washington State Board Against Discrimination of April 24, 1970, any school is deemed segregated if 40% or more of the student body consists of one minority race. The two boards adopted a further Joint Policy Statement on November 30, 1973, affirming the state policy to eliminate segregation from the State's schools. The definition of "racial imbalance" adopted by the Seattle School District and utilized in the Seattle Plan was identical to that adopted by the State Board of Education. (Compare J.A. 50 with J.A. 66). A further Joint Policy Statement was issued by the

Washington State Board of Education and the Washington State Human Rights Commission on October 19-20, 1978, reaffirming the policy goal of eliminating racial segregation from the public schools of the State of Washington.[15]

Finally, at its most recent public meeting, January 14, 1982, the Washington State Human Rights Commission unanimously adopted a resolution confirming its continuing position that Initiative 350 conflicts with the Washington State Law Against Discrimination and violates the Equal Protection Clause of the Fourteenth Amendment.[16]

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[15] All three policy statements are attached as exhibits to the Amicus Curiae Brief of the State Attorney General for the Human Rights Commission filed in the district court. The 1978 statement is also set out in full in the Joint Appendix at 65-70.

[16] The resolution is set out in full as an appendix.

Before adoption of the Seattle Plan, the Seattle School District was not only under pressure and the threat of litigation from the Seattle Intervenor Plaintiffs and from the United States Government,[17] but was in obvious non-compliance with the declared State policy to eliminate racial segregation from all of the State's public schools.

Adoption and implementation of the Seattle Plan brought the Seattle School District into compliance with the State's desegregation policy. The district court's conclusion that Initiative 350 "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments," (J.S. A-34), is not seriously contested. Thus, it is

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[17] See Def. Ex. A-118, at 22-35; R. 1278.

evident that instead of restoring a statewide "neighborhood school policy," Initiative 350 was intended to and would destroy the existing statewide desegregation policy.

The State's Argument on Overbreadth Lacks Candor

As its third and independent basis for declaring Initiative 350 unconstitutional, the district court found the initiative overly inclusive because it prohibits school districts from assigning students to achieve racial balance even where the existing segregation was caused by prior governmental action. (J.S. A-35).

The State bases its argument in opposition to the overbreadth rationale upon the claim that "the district court ignored entirely the interpretation of the initiative by the State," which was "stated

clearly in the Trial Brief of State Defendants." Appellants' Brief at 38.[18]

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[18]The State Attorney General has never rendered a clear opinion that any school board believing itself to be under a constitutional duty to desegregate would be unaffected by the prohibitions of Initiative 350. Nor would such an opinion allow a school board to act with assurance. Under Washington law, the courts are not bound by the Opinions of the State Attorney General, which are given only such weight as their reasoning warrants. Kasper v. Edmonds, 69 Wash. 2d 799, 805, 420 P.2d 346, 350 (1966). In the absence of a definitive ruling from the Washington Supreme Court, any school board action within Initiative 350's prohibitions would almost certainly be challenged by the well organized opponents of desegregation. Even if the State's executive branch were to take no action to enforce the Initiative, private persons remain free to seek injunctive relief in a state trial court. As the record forcefully demonstrates, this occurred when private litigants succeeded (even without the assistance of Initiative 350) in persuading a state superior court to enjoin the Seattle School District from implementing its middle school desegregation program in 1971. That trial court decision, although ultimately reversed by the Washington Supreme Court, caused a delay of one year in implementing earlier desegregation efforts. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P.2d 657 (1972).

The central question in determining whether Initiative 350 is overly broad is whether a local school district, believing itself to be under a constitutional duty to desegregate its schools, can adopt and implement a desegregation program employing the methods prohibited by the statute in the absence of a judicial determination of de jure segregation.

A careful review of all of the State Attorney General's pronouncements on what local school districts may lawfully do under Initiative 350 to remedy de jure segregation, and under what circumstances, compels the conclusion that no opinion has ever been given. Despite a formal request from the State Superintendent of Public Instruction, the Attorney General declined to give any opinion.[19]

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[19] Dr. Brouillet testified at the trial: "We did ask--we did frame a series of questions to the attorney general, on the basis of what we could do, and what we

Footnote 19 (cont.)

could do under 350, and the attorney general did respond to us that, pending the outcome of this case, they wouldn't dispose of those questions." (R. 579.)

The impact of the legal uncertainties created by Initiative 350 on the planning ability of the Seattle School District is illustrated by the following testimony of Seattle School Superintendent Dr. David Moberly, given in response to questions by the attorney for the State:

> A . . . We also have a number of questions that are still not answered in 350 that we have asked the -- through the State Attorney General's Office. We have asked the . . . Attorney General to give us some answers on it because we have a law that we'll be faced with implementing and that raises a series of questions that before complete planning for implementation of 350 can come into effect the Attorney General will have to do his job and answer those.
> Q Have you heard back from the office of the Attorney General? Incidentally, that's my office.
> A Yes, I know.
> Q Have you heard back from them?
> A No, we have not. Whether in recent days he has replied to Superintendent [Brouillet], I do not know but as far as I know at this point the Attorney General has not in any way

If any conclusion can be drawn from the portion of the Trial Brief of State Defendants, quoted in their Appellants' Brief, it is that a local school district cannot, consistent with Initiative 350, undertake a desegregation program in the

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Footnote 19 (cont.)

responded to the State Superintendent's request for answers.

Q. I guess I'm puzzled because I'm aware of having been with the opinions division of that office and they generally decline to offer opinions on matters in litigation.

MR. HALL: That's what they did.

A. Well, how in the hell am I going to plan and be ready if nobody will answer some questions that are very crucial?

Q. Well, the State's position is simple on that. If you want to know how to implement 350, you should have asked the questions first and then started the lawsuit later. Once you start the lawsuit and challenge the law we are sort of hamstrung.

A. Well, we're all in a dilemma right now.

(Def. Ex. A-118, at 70-73; R. 1278).

absence of a judicial declaration of a constitutional duty. According to that "clear statement":

> [W]here a given Washington school district finds itself under a constitutional duty to override Initiative 350, it may certainly do so. The Initiative clearly contemplates in Section Six that its action will be upheld by any court of competent jurisdiction, assuming that such constitutional duty is found to exist. Until a given school district reaches that point, however, it must, as a municipal corporate creature of the State of Washington, attempt to achieve its goals within the limitations imposed by its own creator.

Appellants' Brief at 38 [emphasis added].

Clearly, "that point" referred to by the State is the point at which a court has declared the existence of a constitutional duty, not the point where the local school board concludes that the duty exists.

In view of the refusal of the State Attorney General to render an opinion on this matter, despite being asked to do so,

the claim that the Attorney General's interpretation has been ignored approaches the bizzare. So does the claim that this phantom interpretation is "well supported by legislative history". Appellants' Brief at 39 n.8.

The State's transcript reference to "legislative history," which consists of testimony of Sam Franklin, one of the CiVIC lawyers who drafted Initiative 350, shows just the opposite of what the Attorney General seems to suggest. That testimony leaves no doubt that the drafters of Initiative 350 intended to make it illegal for a local school board to assign students to schools other than their nearest or next nearest, even if the board believes it has a duty to do so:

> Q (By Mr. Hoge) Adding then Section VI, which specified that the initiative would not have an effect on the adjudication of constitutional issues relating to the public schools, what was your

intention, Mr. Franklin, of how that section would work?

Did you merely mean that if a lawsuit were brought which resulted in a determination that schools were de jure segregated, and that bussing of students was required to remedy that, that the initiative would not interfere?

A That would be one application. I suppose another application, very simple, would be if the district felt that 350 was not constitutional, it would simply disobey the state law and take their chances.

Q Would that be disobeying a state law if the district felt it was unconstitutional?

A Yeah, it would be disobeying state law in response to a higher law, I presume, if they are right, they better be right.

Q How would they find out if they were right?

A Someone would sue them, I guess.

Q Would there then have to be litigation for the purpose of determining whether the de jure segregation in the school district was to such an extent to require bussing of students?

A I suppose there would have to be litigation, ultimately, if they chose to disobey the law.

Q Whether initiated by people in favor of bussing for desegregation, or whether it was initiated by people opposed to that concept?

A Whoever.

(R. 1180-81) [emphasis added].

Since the State Attorney General will have the opportunity to further clarify the matter in a reply brief, or in oral argument before the Court, it may be helpful to outline the questions that have yet to be clearly answered:

1. Is a school board, which believes it has a constitutional duty to remedy racial segregation, permitted to make school assignments prohibited by Initiative 350 without violating state law?

2. Must such a school board initiate an action for a judicial determination of its constitutional duty to remedy racial segregation? If so, who would be the parties, what would be the issues, what would be the burden of proof, and who would bear that burden?

3. Must such a school board first persuade the county prosecuting attorney and/or the State Attorney General that it

has such a constitutional duty before it is free to make school assignments prohibited by Initiative 350?

4. Must such a school board attempt to cure the constitutional violation through means consistent with Initiative 350 before employing means prohibited by the Initiative, even if the board believes such permitted means would not be effective? If so, how many years of ineffective efforts would be required before the board could employ methods prohibited by Initiative 350? Would that determination need the approval of the county prosecuting attorney, the State Attorney General, the Court?

5. Must such a school board make a formal finding of its (or its predecessor's) prior violation of the Constitution before making assignments prohibited by Initiative 350? If so, does Washington's Open Public Meeting Act (Rev. Code of Wash.

Ann. Ch. 42.30) require that such a finding be made after public deliberations?

6. If an action is commenced in a state superior court to enjoin a school board from making assignments prohibited by Initiative 350, must the school board prove its own (or its predecessor board's) violation of the Constitution? Must it prove that there are no effective means for remedying the violation except those prohibited by Initiative 350?

7. Can a school board's finding of a past violation of the Constitution by itself or a predecessor board be used against the board or its members in a private action for damages caused by such a violation? Can such a finding be used as evidence in cases charging racial discrimination in other circumstances, e.g., employment discrimination?

8. If a school board finds that it or a predecessor board violated the Constitution, but a later judicial declaration is made that no such violation occurred, can the board's judicially declared violation of Initiative 350 be used against the school district, or the school board's members in a private action for damages caused by such a violation of Initiative 350?

9. Does Initiative 350 repeal by implication the policies of the State Superintendent of Public Instruction and the Washington State Human Rights Commission requiring that racial segregation be eliminated by "whatever means necessary" from Washington's schools, regardless of the cause?

These appellees maintain that the very fact that questions such as these need asking illustrates the deterrent effect of

Initiative 350 on local school officials seeking to fulfill their duty under the Constitution.

Initiative 350 Conflicts With the National Policy of the Equal Education Opportunities Act of 1974

The State argues that "Initiative 350 is nothing more than a state-level legislative parallel to an earlier 1974 act of Congress establishing a national neighborhood schools policy." Appellants' Brief at 35. The State then quotes what it claims to be "[t]he relevant provisions of that Act." Id.

The State fails to quote the most relevant provisions of that same federal statute:

> Denial of equal educational opportunities prohibited
>
> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by --
>
> . . . .
>
> (b) the failure of an educational agency which has formerly practiced

> such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

20 U.S.C. § 1703(b).

> Voluntary adoption of remedies
>
> Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency.

20 U.S.C. § 1716.

As the provisions of the Equal Educational Opportunities Act of 1974 quoted above clearly demonstrate, it is not only the mandate of this Court, but the policy of Congress to encourage local school authorities to desegregate to avoid recourse to the federal courts. Initiative 350 conflicts with basic national policy by

interfering with the power of local school boards to voluntarily desegregate public schools.

The United States Has Compromised Federal Civil Rights Enforcement and Has Forfeited Its Entitlement to the Status of a Party

In the first litigation involving racial segregation in a major northern school district, the Department of Justice noted, "[t]he United States has participated in every school desegregation case which this Court has heard on the merits since Brown I."[20] After Keyes, the Department of Justice continued to enforce vigorously the rights of minorities to equal protection of the law as plaintiff, as intervenor plaintiff, and as amicus curiae.[21] The Department of Justice continued that role when, prior to

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[20] Memorandum for the United States as amicus curiae, at 1 n.1, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[21] See, e.g., United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir.), cert.

obtaining party status, it filed an amicus curiae brief in the district court stating:

> In summary, the United States has a duty and obligation to insure that public school students are afforded equal educational opportunities. The voluntary adoption of desegregation plans by local school districts aids the United States in effectuating this enforcement responsibility. As such it is in the interest of the United States to protect the ability of the plaintiff school districts to continue implementation of their desegregation plans.

United States' District Court Amicus Brief at 5.

In the district court and in the court of appeals, the United States urged that

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Footnote 21 (cont.)

denied, 423 U.S. 946 (1975); Milliken v. Bradley, 418 U.S. 717 (1974); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976). It should also be noted that the United States participated as amicus curiae in two of the cases that provide a conceptual underpinning to the present case, Reitman v. Mulkey, 387 U.S. 369 (1967) and Hunter v. Erickson, 393 U.S. 385 (1969), urging a position irreconcilable with that now asserted.

Initiative 350 be declared unconstitutional on all of the grounds upon which those courts ultimately so ruled.

The United States' decision to repudiate the position it urged upon the lower courts was made without notice to, or consultation with, the parties the United States had previously committed itself to support. From December 16, 1980, the date of the decision of the Ninth Circuit Court of Appeals, until the United States switched sides, neither the courts nor the Congress made any change in the law which could justify the switch on the basis of a principled constitutional reanalysis of the case. In their zeal to justify their shocking change of position, the authors of the pleadings filed in this Court on behalf of the Government have totally disregarded the rules of the

Court,[22] the Canons of Ethics and the facts of the case.

A. The United States should be denied further participation in this case

The United States was permitted to intervene in the district court on the basis of a motion to intervene under Section 902 of the Civil Rights Act of

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[22]Prior to filing its Brief for the United States, the Department of Justice had sought an extension of time. Contrary to Supreme Court Rule 29.3 the Department failed to serve these appellees with a copy of that request or to otherwise notify them of the intent of the United States to continue to participate in the case as a party. This made it impossible for these appellees to obtain a ruling on the question of entitlement of the United States to so participate in advance of the filing of the United States' brief.

This failure also prevented these appellees from seeking in advance a determination of their objection, on the grounds of professional ethics, to the continued representation of the United States by the Department of Justice. That objection was, however, made directly to and rejected by the Solicitor General prior to the filing of the Brief for the United States.

1964, 42 U.S.C. § 2000h-2. As the language of that statute, its purpose, its legislative history, and its continuous use have shown, the statute permits intervention only on behalf of civil rights plaintiffs. Although the Court has denied the motion of the United States to expand the time for oral argument and for divided argument, the Court's action does not make clear whether the United States is to be permitted to retain its status as a party. For the reasons previously set out in the objection filed by these appellees and in the separate objection filed by the School District Appellees, the United States should be deprived of the status of a party under the circumstances of this case.

Apparently, no direct case precedent exists to aid the parties or the Court in analyzing the propriety of repudiating a position taken as a co-party in the lower courts and attacking that position and the

co-parties previously supported. The situation is totally unlike the great tradition of the sovereign "confessing error" in a criminal case. In such cases, the matter is concluded when the Government chooses to discontinue further use of its power against the defendant. In this case, the matter is not concluded and the Government has turned its power against those with whom it shared a common commitment.

B. The United States' analysis relies upon an erroneous factual premise

The United States asserts that, "there is no evidence that any [de jure] discrimination exists within the state" (United States' Brief at 14), and that, "[t]his case does not involve constitutionally proscribed racial discrimination, because there has been none." Id. at 34. The United States suggests that the Court should not view the case against a backdrop of assumed racial discrimination, but

rather should approach the case with the opposite assumption. This, the United States argues, is because:

> The Initiative's potential for impeding elimination of de jure segregation can be "real" only if there are school districts in the state of Washington that are, and recognize that they are, unconstitutionally segregated. The district court made no such finding. Nor is there any evidence in the record to support such a finding.

United States' Brief at 47.

The United States further asserts that:

> The plaintiff school districts in this action cannot argue that the Initiative impermissibly burdens their duty to remedy de jure racial imbalance because they maintain there is no such segregation in their districts.

Id. at 46 n.44.

These assertions by the United States are wholly refuted by the record and the United States' own analysis demonstrates that "[t]he Initiative's potential for impeding elimination of de jure segregation" is quite "real."

The Seattle School District candidly admits in its brief that:

> The Board was well aware that there was some likelihood a court could find unlawful segregation in Seattle. J.A. 12-13, 16-17, 74, & 127. Although unable and unwilling to examine the motives of its predecessors, the Board was not unreasonable in its perceptions. Faculty assignment practices, for instance, had been similar to those [that] numerous court decisions have deemed to further schools' racial indentifiability. Pl. Ex. 69. Other historical factors, such as drawing of attendance boundaries and student transfer policies, in some instances bore at least surface similarity to the facts reported in Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman (II), 443 U.S. 526 (1979); Keyes v. School District No. 1, 413 U.S. 189 (1973); and similar decisions.

Seattle School District Brief at 4 n.3. This admission is fully supported by and consistent with the testimony of members of the Seattle School Board, itself.[23]

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[23] School Board Member Cheryl Bleakney testified in her written statement as follows:

Footnote 23 (cont.)

> The Board had numerous discussions with our attorneys during the winter and spring of 1977, trying to assess our vulnerability to charges of segregatory acts, and the risks involved in federal court action. I believe we all wanted to avoid such time-consuming and expensive litigation and the likelihood of court intervention in the educational management of our School District. Only one Board member remained unconvinced that our action was necessary to avoid this eventuality. (J.A. 127.)

On cross examination by the attorney for the State, Ms. Bleakney testified:

> Q. In the legal requirements that you were attempting to satisfy, the legal entanglement that you were attempting to avoid, were entanglements from direction of the federal government or private individuals or interest groups here in the Seattle area, were they not?
> A. Could you rephrase that, Mr. Murphy?
> Q. You were afraid you were going to be sued?
> A. Yes.
> Q. You were threatened with suit, in fact?
> A. Yes.
> Q. The suit was coming either from the United States or from private groups, the Seattle Urban League, the N.A.A.C.P., et cetera, isn't that right?

Footnote 23 (cont.)

> A. Yes.
> Q. You were threatened with suit, in fact?
> A. Yes.
> Q. The suit was coming either from the United States or from private groups, the Seattle Urban League, the N.A.A.C.P., et cetera, isn't that right?
> A. Yes.
> Q. So, that you adopted a plan and adopted a formula, a definition of the racial imbalance or racial desegregation, which was designed to avoid that lawsuit?
> A. It was designed to withstand a lawsuit in case we were hauled into court.

(J.A. 12-13.)

Board Member Bleakney went on to testify that, "the overriding [reason for adopting the Seattle Plan] was the consequences of possible court action." (J.A. 17.)

Testifying further with regard to the reasons for the Board's adoption of the Seattle Plan, Ms. Bleakney stated:

> Q. (By Mr. Hall) You took an oath of office when you became a School Board member?
> A. Yes, sir.
> Q. To, among other things, defend the Constitution of the United States and of the State of Washington?

If evidence of unlawful segregation beyond the admissions of the Seattle School Board itself were required, the record contains it, even though such evidence was excluded from "Phase I," when the case was bifurcated without objection by any party.[24] The United States' claim that

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Footnote 23 (cont.)

> A. Yes, I did.
> Q. To what extent was that a material factor in regard to the decision to adopt the Seattle Plan?
> A. For me, it was a factor, because after my readings of court cases involving other school districts, particularly in the northern United States, I felt we had a constitutional obligation to desegregate, and I felt an obligation to follow that dictate.

(J.A. 74.)

[24] In the district court, the Complaint in Intervention of the Seattle Plaintiffs, at 11-17, alleged specifically that the racial segregation existing in the Seattle School District prior to adoption and implementation of the Seattle Plan was a direct result of purposeful acts and omissions of prior Seattle school boards. The Complaint in Intervention of the East Pasco Neighborhood Council Plaintiffs, at 3-4, made similar allegations with respect to racial

no such evidence exists in the record is particularly troubling in view of the prior administrative actions of the United States government against the Seattle School District. For example, the affidavit of Marlaina Kiner, Director of the Office for Civil Rights of the United States Department of Health, Education, and Welfare

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Footnote 24 (cont.)

segregation within the Pasco School District prior to implementation of a desegregation program in that city. Indeed, the United States Department of Justice indicated its intention to assist in the presentation of proof of past purposeful discrimination if necessary.

From the outset, the Seattle School District also alleged and maintained that racial imbalance in the district is substantially due to segregated housing patterns in the City of Seattle which are "the direct result of the racially discriminatory past actions of constituent parts or agencies of the governments of the State of Washington and the United States of America, and of private persons and entities licensed by and subject to governmental regulation." Complaint at 25.

outlines portions of that history, including the Seattle School District's admitted practice of assigning minority teachers to identifiably "minority schools":

> In early 1975, the Seattle School District made application for "basic" and "pilot" ESAA money for school year 1975-76. Regional OCR made a recommended determination, in connection with those applications, that the District was ineligible for ESAA funding as a result of discriminatory assignments of teachers to schools, and failure to adequately identify and serve limited English-speaking national origin minority students. . . . As a result of the District's failure to submit an ESAA waiver application, I sent a letter to the District on July 28, 1975,

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Footnote 24 (cont.)

The district court bifurcated the proceedings and limited the evidence in "Phase I" to Initiative 350's "facial" constitutionality. The proof of the intervenors' allegations of past purposeful segregation was reserved to "Phase II", which was not reached because of the district court's ruling in "Phase I". The United States supported and participated in the bifurcation of the case. It is, therefore, inappropriate for the United States to ask the Court to infer a factual conclusion from the absence of evidence that was excluded by a procedure adopted without objection from any party.

> notifying it that it was in violation of Title VI of the Civil Rights Act of 1964 because of the same discriminatory faculty assignment practices which had rendered it ineligible for ESAA funding. My Office sought the District's voluntary compliance for seven (7) months, from July 28, 1975 but failed to secure an acceptable faculty desegregation plan. On March 1, 1976, the General Counsel of HEW commenced administrative enforcement proceedings against the District under Section 602 of the Civil Rights Act of 1964, based in part on the faculty assignment violation. On May 17, 1976, I signed an agreement with the District adequately resolving the faculty assignment violation and promising speedy desegregation of the certified staff in the District.

(Pl. Ex. 69, at 4-5; R. 691, 692). The Marlaina Kiner affidavit continues:

> Beginning in the Fall of 1976, following the May 1976 OCR-District agreement on desegregation of faculty, discussions within the Seattle District began anew as to the issue of student desegregation. (Id. at 6.)

Those discussions as well as the investigation of the formal administrative complaint of the N.A.A.C.P., Seattle Branch, alleging past purposeful segregatory acts by the

Seattle School District (attached to Pl. Ex. 69, at 12-15) were ultimately deferred by the written Memorandum of Agreement (also attached to Pl. Ex. 69, at 16-20) between the Seattle School District and the Office for Civil Rights, following adoption of the Seattle Plan.

The denial by the United States of the existence of unlawful segregation in the Pasco District is most troubling. As noted earlier, even the State of Washington points in its brief to the glaring "invidious and intentional racial discrimination" that is a part of the history of that city.[25] That history flows in large measure from a segregated housing pattern actually created by the federal government

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[25] See, supra, at 12, quoting the State's Post Trial Brief in the district court asserting that the state defendants believe that Pasco's original segregation was "invidious and intentional."

when it selected Hanford as the site for the production of plutonium for the Manhattan Project in 1943. Employment opportunities for that project brought blacks to the Tri Cities. Richland was then a federal government-owned town and under rigid federal housing regulations which excluded blacks. (J.S. A-9, § 4.1) The Pasco Intervenor Plaintiffs/Appellees correctly state in their brief, at 20 "[t]here can be no genuine dispute about the constitutional duty to maintain a mandatory student assignment program in Pasco, considering the pattern of school construction."

CONCLUSION

The adoption and implementation of the Seattle Plan was the result of many factors including the courage and wisdom of local school officials. However, in the final analysis, the impetus for action was

the certainty that federal court intervention would be the price of inaction.[26] Local school boards throughout the nation will look to the decision in this case to see if the Court's past demand for positive local leadership will be coupled with support for a board that took the Court at its word.

For the reasons stated herein, and in the briefs of the School District Appellees and the various amici supporting affirmance, Initiative 350 violates the United States Constitution. It must, therefore, fall. The decision of the court of appeals should be affirmed.

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[26] A. Siqueland, Without a Court Order: The Desegregation of Seattle's Schools, (1981), at 185.

DATED this 25th day of January, 1982.

Respectfully submitted,

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APPENDIX

WASHINGTON HUMAN RIGHTS COMMISSION

R E S O L U T I O N

WHEREAS, the Washington State Human Rights Commission has exercised its authority under RCW 49.60 by adopting WAC 162-28-030 to deal with discrimination in public schools; and

WHEREAS, the Washington State Human Rights Commission and the Washington State Board of Education signed a Joint Policy Statement in 1970 and jointly revised the Statement in 1973 and 1979 on school desegregation; and

WHEREAS, the Joint Policy Statement of the Washington State Human Rights Commission and Washington State Board of Education declares that it is incumbent upon the public schools in Washington State to develop programs which lessen the effect of racial prejudice and segregation and that it is the responsibility of school boards to assign pupils to buildings in ways which result in the desegregation of the public schools; and

WHEREAS, it is the position of the Washington State Human Rights Commission that the attempts of the Seattle, Tacoma and Pasco School Districts to desegregate the public schools in the State of Washington through mandatory pupil reassignment were made in part to comply with the Washington State Law Against Discrimination; and

WHEREAS, it continues to be the position of the Washington State Human Rights Commission that Initiative 350 conflicts with the Washington State Law Against Discrimination; and

WHEREAS, it continues to be the position of the Washington State Human Rights Commission that Initiative 350 is invalid because it violates the Equal Protection Clause of the 14th Amendment of the United States Constitution; and

WHEREAS, at its duly constituted public meeting in Seattle, Washington on December 17, 1981, the Washington State Human Rights Commission voted affirmatively to write a Resolution stating that

> "...the Commission feels that Initiative 350 is inconsistent with the State Law Against Discrimination for the same reasons stated in the 1979 Brief of Amicus Curiae on this subject; that the Commission's position as stated in the 1979 Brief remains their position today..."

NOW, THEREFORE, BE IT RESOLVED, that the Washington State Human Rights Commission affirms its opinions and positions as set forth in its 1979 Brief of Amicus Curiae, filed in the United States District Court, Western District of Washington, in the case of Seattle School District No. 1, et al. v. State of Washington, et al., Case No. C-78-753; and

BE IT FURTHER RESOLVED, that the Washington State Human Rights Commission affirms its position that school desegregation is essential in order to comply with the Washington State Law Against Discrimination; and

BE IT FURTHER RESOLVED, that it is the position of the Washington State Human Rights Commission that Initiative 350 is inconsistent with the State Law Against Discrimination.

Signed this 14th day of January, 1982.

/s/
SYMONE SCALES, CHAIRPERSON
Washington State Human Rights Commission

/s/
JOE TRIM, MEMBER
Washington State Human Rights Commission

/s/
RITA DURAN, MEMBER
Washington State Human Rights Commission

/s/
RON TAKEMURA, MEMBER
Washington State Human Rights Commission

/s/
EDITH KOGENHOP, MEMBER
Washington State Human Rights Commission